Supreme Court, U.S.
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No. 98-82

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,

Petitioner,

v.

MICHAEL VENCL,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

MEMORANDUM IN OPPOSITION

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QUESTIONS PRESENTED

1. May a union be held liable for breach of its duty of fair representation where it decides that a grievance is meritorious but fails to file timely for arbitration because its business agent goes on vacation instead?

2. When a union's breach of the duty of fair representation forces the member to proceed independently against the employer to seek redress for breach of the collective bargaining agreement, may the court award as part of its remedy the costs of obtaining a settlement with the employer to provide such redress, regardless of whether the employer is liable for breach of contract?

3. Did petitioner preserve Question No. 2 in the lower courts by arguing that the dismissal of the employer through a settlement of the breach of contract claim was itself sufficient to warrant denial of any relief against the union?

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MEMORANDUM IN OPPOSITION

At issue in this case is a judgment against a union for breach of the duty of fair representation based on the fact that the union officer who was supposed to seek arbitration of respondent's discharge went on vacation instead. The courts below deemed this perfunctory grievance handling to be arbitrary and in breach of the DFR, and the union now objects, based in part on arguments that it did not raise below. Because the decision below is consistent with other lower court decisions, and because the questions on which review is sought are not properly presented and were not preserved below, the petition for a writ of certiorari should be denied.

STATEMENT

For fifteen years, respondent Michael Vencl was employed by American High Reach Inc. ("AHR") as a technician, repairing machinery both in his employer's Richfield, Ohio facility and in other locations. AHR's Richfield employees were represented in collective bargaining by petitioner Operating Engineers Local 18.

In March, 1993, respondent was injured at work when a large piece of equipment rolled over his foot. Although respondent tried to work for the next two days, against his doctor's advice, the injury worsened and ultimately his doctor instructed him to stay off the foot and take medication. AHR reprimanded respondent for consulting his doctor, and ultimately fired him for being "unreliable."

Respondent filed a grievance which petitioner processed through the first two steps of the grievance procedure as provided by the collective bargaining agreement ("CBA"). Although AHR denied the grievance at both levels, petitioner

acknowledged that respondent had a meritorious grievance, and committed to file for arbitration. The CBA required requests for arbitration to be made, *in writing, within three business days* of the completion of the second step. At the grievance hearing, and before AHR answered the grievance, the union's business agent allegedly told the company of his desire for arbitration if the grievance were denied. But instead of filing within the three days, the business agent went on vacation. As a result, the union did not get around to filing for arbitration until the fourth day, and that was done by a different union official. Due to this untimely filing, the arbitrator denied the grievance.

Respondent then sued petitioner and AHR in the United States District Court for the Northern District of Ohio, alleging that American had breached the CBA and that petitioner had breached its duty of fair representation ("DFR"). In response to motions to dismiss filed by both defendants, the district court struck respondents' claims for certain forms of damages and for attorney fees. However, after the case was reassigned to a newly appointed district judge, she granted a motion to reconsider the claim for attorney fees, at least insofar as the fees had been expended in pursuing respondent's contractual claim against AHR. Pet. App. A29-32. The court noted that the cost of pursuing a grievance in court, which is thrust upon an employee when the union breaches its DFR and hence causes the grievance process to misfire, may properly be awarded to the employee as a form of damages, without violating the American Rule whereby parties to litigation normally bear their own attorney fees. *Id.* A31.

After an exchange of discovery, petitioner moved for summary judgment on the ground that petitioner did not breach its DFR; the employer joined this motion, and respondent cross-

moved for partial summary judgment on this issue. Respondent argued that, by going on vacation rather than timely filing for arbitration of a grievance that it recognized was meritorious, petitioner had treated his grievance with such indifference as to be arbitrary, thus violating its DFR. The district court agreed, noting that petitioner's treatment of respondent's grievance "was 'arbitrary' [because] it was 'without rational explanation' [and because] it was the result of a complete lack of consideration and choice." Pet. App. A21. "As such, the union's action was 'irrational' -- there was no ratiocination at all." *Id.* It acknowledged that mere negligence was not a sufficient basis for finding a breach of the DFR, *id.*, but noted that the petitioner here had not merely been careless, such as by relying on a past practice allowing late demands for arbitration that are ultimately rejected by the arbitrator. Nor did petitioner have any rational explanation of why it could reasonably ignore the express contractual requirement of a written demand for arbitration within three days. *Id.* A22. Here, a union official had just gone on vacation and ignored the grievance that he had promised to file, "a clear example of arbitrary and perfunctory handling of a grievance . . .." *Id.* Accordingly, the district court denied the petitioner's and employer's motions, and granted respondent's motion for partial summary judgment. A motion for reconsideration was denied.

Respondent then moved to amend his complaint to join Bramble Equipment Services ("BES"), as a successor to AHR. As the case was being readied for trial, the case was assigned to yet another newly appointed district judge, and respondent settled his claims against AHR and BES, receiving money in return for their dismissal from the case. Petitioner then renewed its motion for summary judgment, arguing that the facts did not make out a breach of the DFR, that attorney fees

could not be awarded as damages in DFR case, and finally that, because the case against the employers had been settled, the district court no longer had jurisdiction of the claim against the union. The district court dismissed the action against petitioner, but solely on these jurisdictional grounds. Pet. App. A12-A15. It recognized that this Court has held that DFR suits may be filed against unions even without being joined to a contract claim against an employer, but it deemed this case to be different because the employer is necessarily involved in any case alleging that the DFR breach involved the failure to process a claimed breach of the CBA. *Id.* A14-A15. In such "hybrid" cases, the court said, dismissal of the employer prevents the employee from showing a necessary element of his claim against the employer, thus depriving the district court of jurisdiction.

Respondent then appealed to the United States Court of Appeals for the Sixth Circuit. He argued that this Court has long held that DFR claims, even DFR claims growing out of improper grievance processing, may be brought solely against the union without being pursued to judgment against the employer, or against the employer without being pursued to judgment against the union, although damages would be apportioned between the two defendants. At trial on remand, he argued, the question of breach of contract could be litigated regardless of whether the employer was still a party. Petitioner defended its judgment on a narrower ground than the one stated by the district court. According to petitioner's argument below, a union member may not recover against a union for breach of DFR unless the employee has also recovered a judgment against the employer. Moreover, it contended, the employer's dismissal from the case pursuant to the settlement prejudiced petitioner by preventing the breach of contract issue from being

fully litigated. Petitioner did not make the argument on which it bases the second question presented in its petition for a writ of certiorari -- that a DFR claim against the union cannot be granted unless the district court has previously made a factual finding of the employer's breach.

Petitioner cross-appealed the grant of partial summary judgment in favor of respondent, on three grounds.[1] First, it objected to the granting of respondent's oral motion for partial summary judgment without giving it the opportunity to submit evidence. Second, it denied it had proceeded arbitrarily, but had simply made a negligent error that did not amount to a breach of DFR. Finally, respondent contended that attorney fees could not be awarded in DFR cases as a form of damages. These arguments were presented solely as a basis for overturning partial summary judgment on the issue of liability. Presumably recognizing that respondent, too, might have the opportunity to present more evidence on the issue of DFR liability, petitioner did not contend that its legal arguments on cross-appeal provided an alternate basis for affirming the dismissal for lack of jurisdiction.

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[1] Its cross-appeal was filed after respondent appealed the dismissal for lack of jurisdiction. Petitioner did not appeal either the grant of partial summary judgment, or the ruling that respondent could seek attorney fees, within thirty days after either ruling was issued. In response to Federal Rule of Appellate Procedure Rule 28(a)(2), petitioner's appellate brief stated in conclusory fashion that its cross-appeal was "properly before this Court pursuant to 28 U.S.C. § 1291." It did not explain how the rulings it was appealing constituted a "final judgment" under section 1291.

A unanimous panel of the court of appeals reversed the dismissal for lack of jurisdiction. It agreed with the parties that relief for a breach of DFR alleged to have been committed in processing a contractual grievance cannot be granted without at least a colorable allegation of breach or contract, Pet. App. A6, but concluded that the absence of the employer as a defendant would not prevent the employee from either alleging or proving such a breach. *Id.* A7-A8. The court acknowledged that the absence of the employer as a party may make litigation of its breach more difficult, as a practical matter, than if the employer were a party, but such problems did not deprive the court of jurisdiction. *Id.* A8-A9.

The court then turned to petitioner's cross-appeal from the grant of partial summary judgment on the issue of liability, and the refusal to strike the claim for attorney fees. The court did not first examine the question of jurisdiction of the cross-appeal; indeed, its opinion does not discuss the question of appellate jurisdiction at all. On the issue of liability, the court agreed with petitioner that mere negligence in the processing of a grievance cannot breach the DFR. Untimely filing of a grievance, for example, will often not breach the DFR if it simply represents a mistake based on a misunderstanding about whether late filings may be acceptable. Here, by contrast, there was no "reasoned conduct," simply inattention to the grievance. Such "irresponsible inattention" may amount to arbitrary conduct in breach of the DFR. Pet. App. A9-10.

Finally, the court of appeals upheld the district court's determination that attorney fees might be awarded as damages, because the expense of pursuing the claim against the employer is precisely what the union "cost" the employee by failing to undertake this action itself. *Id.* A10-A11. The court agreed that

the American Rule bars a member from obtaining an award of fees for the efforts to obtain relief from the union, but not those fees and costs incurred in pursuing his claim against the employer. The district court's ruling had properly distinguished between these two forms of relief. Accordingly, the court remanded for further proceedings to determine whether any relief should be awarded and, if so, in what amount.

Petitioner then filed a petition for rehearing in which it repeated its previous point but also argued, for the first time, that the partial summary judgment was improper because the district court had not yet found a breach of contract by the employer. The petition was denied without any judge voting for rehearing.

REASONS FOR DENYING THE WRIT

THE QUESTIONS PRESENTED IN THE PETITION WERE NOT PRESERVED IN THE COURTS BELOW, AND IN ANY EVENT THE RULING BELOW IS CONSISTENT WITH OTHER APPELLATE DECISIONS AS WELL AS WITH PREVIOUS DECISIONS OF THIS COURT

Neither of the questions that respondent asks this Court to decide were either properly presented in the courts below, or are otherwise worthy of the Court's consideration. The first question, about the standard to be used to deciding whether a union breaches its DFR through perfunctory processing of a grievance, was decided in the district court on a motion for partial summary judgment, which the court of appeals reviewed despite the fact that it lacked jurisdiction; moreover, the rulings below on this issue conflict neither with this Court's decisions

nor with the decisions of other federal courts. The second question, whether an employee can obtain relief against the union for violation of the DFR without first showing a breach of contract by the employer, was simply not presented below; instead, petitioner argued only that the dismissal of the employer in connection with a settlement was prejudicial because it excused respondent from having to show a breach of contract. Nor did the court of appeals excuse respondent from proving a breach of contract -- it simply left that issue to be decided on remand. Accordingly, the decision below was entirely correct and is not in conflict with other courts of appeals, and the petition should be denied.

1. The principal issue on which petitioner seeks review is whether a union may violate its DFR by any action other than "bad faith or arbitrary or discriminatory conduct," and specifically by missing a deadline for seeking arbitration of a grievance "through unintentional inadvertence." Pet. i.

a. That issue is not presented here, and it was not properly presented in the court below. Petitioner sought summary judgment arguing that it simply made a mistake in processing the grievance through mere negligence, and that negligence was not sufficient to make out a violation of the DFR; respondent cross-moved for partial summary judgment on the issue of whether petitioner had violated its DFR by its perfunctory handling of the grievance. The district court denied petitioner's motion for summary judgment and granted respondent's motion for partial summary judgment on this one issue in the case. Both rulings were entirely interlocutory, and neither was appealable. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976). Nor did petitioner file any appeal from those orders within the thirty-day time limit.

Respondent did appeal after the district court dismissed the action for lack of jurisdiction, but that action did not create jurisdiction for the cross-appeal of the grant of the motion for partial summary judgment. The fact that a court of appeals has jurisdiction of an appeal does not mean that it necessarily has jurisdiction of a cross-appeal -- jurisdiction of cross-appeals must be established separately. *See, e.g., Perdaza v. Shell Oil Co.*, 942 F.2d 48, 54-55 (1st Cir. 1991) (denial of summary judgment could not be cross-appealed with appeal from dismissal on preemption grounds); *Hotel & Rest. Employees Local 54 v. Danziger*, 709 F.2d 815, 821 (3d Cir. 1983), *vacated on other grounds*, 468 U.S. 491 (1984) (denial of summary judgment could not be cross-appealed with appeal from preliminary injunction). And a cross-appeal cannot be filed from a favorable judgment, simply because a party does not like some of the adverse rulings that were entered in the course of reaching that judgment. *E.g., Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151, 176 (1934). Because the district court's judgment was entirely in petitioner's favor, there was no judgment from which it could file a cross-appeal.

Moreover, although courts of appeals have jurisdiction to review all interlocutory orders that are merged into the final judgment, because they could have affected the outcome, *e.g., Chacon v. Wood*, 36 F.3d 1459, 1467 (9th Cir. 1994); *Kamen v. Kemper Finan. Serv.*, 908 F.2d 1338, 1341 (7th Cir. 1990), *reversed on other grounds*, 500 U.S. 90 (1991), the partial summary judgment in respondents' favor could have had no impact on the later decision to dismiss for lack of jurisdiction. As a consequence, the court of appeals did not have jurisdiction of the cross-appeal, and certiorari should not be granted in order to decide whether the opinion of the court of appeals addressing that question was correct.

b. Nor is petitioner correct in accusing the court below of holding that it could be found guilty of violating the duty of fair representation based on merely "unintentional inadvertence." To the contrary, the district court specified that "mere negligence on the part of a union cannot support a claim for breach of the statutory duty of fair representation." Pet. App. A21, A25. The Sixth Circuit has consistently held that mere negligence is not enough. *E.g.*, *Black v. Ryder/PIE Nationwide*, 15 F.3d 573, 584 (6th Cir. 1994); *Poole v. Budd Co.*, 706 F.2d 181, 184 (6th Cir. 1984); *Ruzicka v. General Motors Corp.*, 649 F.2d 1207, 1212 (6th Cir. 1981). Where the union can offer a reasoned explanation for its conduct, the *Ruzicka* standard excuses it from liability. On the other hand, "an arbitrary decision is one which arises from caprice or is without reason." *Id.* at 1211 n.3. In such a case, a breach of the DFR may be found.

Here, the union did not offer **any** explanation for its failure to pursue the grievance. It simply explained that its business agent had gone on vacation instead of filing an arbitration demand for a grievance that it recognized was valid. In the courts below, the union did "not claim that it made a reasoned decision not to file the arbitration documents in a timely fashion." Pet. App. A25; *see also id.* A10. It was this absence of reasoned decision-making that formed the basis for the finding that petitioner's actions were perfunctory and arbitrary. In this regard, the decision below is consistent with this Court's prior decisions and with the decisions of other lower federal courts.

Indeed, the petition itself recognizes that long-standing Sixth Circuit law is that simple negligence is not sufficient to warrant a finding of DFR breach. Pet. 12-13, citing cases.

Petitioner urges this alleged intra-circuit disagreement as a basis for granting review in this case. If anything, however, the fact that the Sixth Circuit generally does not follow the rule of law that petitioner inaccurately attributes to the decision below is a reason not to grant review here.

Nor is there any conflict between the decision below and the various decisions of this Court and other lower federal courts that petitioner cites. This Court has repeatedly held that the duty of fair representation requires a union to "make decisions as to the merits of particular grievances, in a good faith and nonarbitrary manner," *Vaca v. Sipes*, 386 U.S. 171, 194 (1967), while protecting the union's ability to make incorrect decisions so long as it acts both rationally and within a wide range of reasonableness. *ALPA v. O'Neill*, 499 U.S. 65, 75-76 (1991). But where the union either ignores a grievance, or processes it in a perfunctory way, it may be found to have violated its DFR. *Vaca*, *supra*, 386 U.S. at 194.

Every one of the reported cases cited by petitioner upheld the union's treatment of a grievance because the union actually made a reasoned decision that fell within the "wide range of reasonableness." In most of the cases the decision was about the merits of a grievance, *Trnka v. UAW Local 688*, 30 F.3d 60, 62-63 (7th Cir. 1994); *Bellesfield v. RCA Communications*, 675 F. Supp. 952, 957 (D.N.J. 1987); *see also Flynn v. Prudential Ins. Co.*, 1996 U.S. Dist. LEXIS 7638 (S.D.N.Y. 1996) (plaintiff claimed that union filed untimely, but undisputed evidence was that union had decided that grievance lacked merit); in two others, the decision was either a tactical one about the arguments to be presented in an arbitration, *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1177 (7th Cir. 1995), or a procedural one about the desirability

of delaying a demand for arbitration so that other processes could be completed. *Riley v. Letter Carriers Local 380*, 668 F.2d 224, 228 (3d Cir. 1981). In each case, the court simply refused to second-guess the union's decision, because whether or not it was incorrect, it was within a wide range of reasonableness.[2]

Those decisions do not conflict with the decision below because the union here did not claim that it had made a reasoned decision to make only an oral demand for arbitration within the required time, instead of a written one. Indeed, petitioner did not even make an oral demand for arbitration; according to the petition, it simply stated, during the grievance procedure, that it intended to arbitrate if need be. Pet. 5. But the contractual requirement of a written demand was plain, and "Local 18 does not argue that its failure to timely seek arbitration was due to reliance on the prevailing practice of freely granting extensions." Pet. App. A22, *quoting Ruzicka v. General Motors Corp.*, 649 F.2d 1207, 1211 (6th Cir. 1981). The court below affirmed because "*Ruzicka II* excuses only reasoned conduct, not irresponsible inattention." Pet. App. A10.

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[2] The only case cited by petitioner that involves a belated filing for arbitration is the unreported decision in *Hill v. Sanford Corp.*, 1997 U.S. Dist. LEXIS 3713 (N.D. Ill. 1997). But in that case, the CBA did not expressly require a written demand for arbitration; the court concluded that the failure to make a written demand, although it derailed the grievance, was understandable because the business agent was sick and an inexperienced union staff member relied on his assurance that arbitration had been demanded.

Here, the courts below were satisfied that the union handled respondent's grievance in only a perfunctory and therefore arbitrary manner, and that the DFR was violated. There is no conflict with the decisions of other lower courts in that regard, and the petition should therefore be denied.[3]

2. The second question in the petition is even more deeply flawed, both because the argument was not made below and because the issue is not presented in this case. In the lower courts, respondent moved for partial summary judgment on the issue of whether petitioner had breached its DFR; petitioner moved to strike respondent's demand for attorney fees and certain other forms of monetary relief. In the end, respondent's motion was granted (finding that there had been a DFR violation), and petitioner's motion was denied (holding that respondent could seek attorney fees). The district court never held that respondent was entitled to relief against petitioner, not to speak of holding that such relief could be obtained without a finding about whether the employer had violated the CBA when it fired respondent. Similarly, the court of appeals did not address the question of whether respondent was entitled to relief in this case. It simply held that the district court had jurisdiction, and affirmed the ruling below that the union violated its DFR and that attorney fees was a proper form of relief. Only in its petition for rehearing did petitioner argue, for

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[3] There is no merit to petitioner's contention, Pet. 18-19, that the decision below conflicts with many arbitral decisions holding that only substantial compliance with grievance filing deadlines is required. The courts below expressed no view on that general question. After all, the union here was not relying on such a practice, and the CBA was clear in requiring written notice.

the first time, that the partial summary judgment should be reversed because there had not yet been a finding of breach of contract. But that was too late to preserve the question for this Court's review, especially where the petition was denied without comment. *See Hanson v. Denkla*, 357 U.S. 235, 243-244 (1958).

The reason why this issue was never addressed in the court of appeals is that petitioner did not advance its current argument below. Instead, petitioner's argument was that the employer had to be a **party** to the litigation, and that dismissal of the employer from the case destroyed the district court's jurisdiction. It further argued that respondent's settlement with the employer and stipulation of the employer's dismissal prejudiced petitioner in its ability to litigate the question whether the CBA was violated, and constituted an admission by respondent of the insufficiency of its breach of contract claim against the employer. But it never argued that a finding of breach of contract was required, but absent in this case, thus precluding an award of relief.

Petitioner's request for review on the ground that respondent needs to prove a breach of contract appears to be something of an academic exercise. After all, petitioner's position below was that the employer did breach its contract; it pursued that claim in arbitration (albeit belatedly), and it repeatedly asserted in the district court, and it continues to assert in this Court, Pet. 4, that it believed that the employer violated the CBA. Respondent will remind the district court of petitioner's position on this issue, and to argue that petitioner is bound by its prior statements. We do not believe that petitioner has much chance of prevailing on this element of the suit. But the fact remains that the issue was not litigated below, and the

lower courts did not issue any holding contrary to petitioner's position here. Accordingly, review is not warranted on this question either.

CONCLUSION

The petition for a writ of certiorari should be denied.

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